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No. 22

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, T. J. McCARTHY STEAMSHIP COMPANY AND AUTOMOTIVE TRADES STEAMSHIP COMPANY, APPELLANTS

v.

DETROIT AND CLEVELAND NAVIGATION COMPANY, GREAT LAKES TRANSIT COMPANY AND NICHOLSON UNIVERSAL STEAMSHIP COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the district court (R. 82–90) is reported in 57 F. Supp. 81. The decision of Division 4 of the Interstate Commerce Commission (R. 22–25) is reported in 250 I. C. C. 550 and the decision of the full Commission on rehearing (R. 10–20) is reported in 260 I. C. C. 175.

JURISDICTION

The final decree of the three-judge district court was entered on November 20, 1944 (R. 90). The petition for appeal was presented and allowed on December 18, 1944 (R. 91, 92). Probable jurisdiction was noted on February 26, 1945 (R. 647).

The jurisdiction of this Court is conferred by Section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345).

QUESTIONS PRESENTED

1. Whether a determination by the Interstate Commerce Commission under Section 309 (c) of the Interstate Commerce Act that service by a new carrier will be required by the future public convenience and necessity is invalidated by the absence of a positive finding that the existing carriers will be unable to obtain the additional facilities necessary for meeting future transportation demands.

2. Whether it is the policy of the Interstate Commerce Act to forbid new competition in any field which has in the past been adequately served by the existing carriers.

3. Whether the Commission's finding that the transportation service proposed by the appellant

steamship companies will be required by future public convenience and necessity rests upon a rational basis, as disclosed by its report, and is supported by substantial evidence.

4. Whether the Commission's findings as to the inadequacy of the appellees' past service are in themselves sufficient to support its finding as to the public convenience and necessity of service by the appellant steamship companies.

5. Whether the Commission improperly permitted a broadening of the scope of the operating rights requested in the written applications filed with the Commission.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 52–55.

STATEMENT

This is an appeal from a decree of a three-judge district court setting aside an order of the Interstate Commerce Commission issued pursuant to Section 309 (e) of Part III of the Interstate Commerce Act (49 U. S. C. 909 (e)) granting to T. J. McCarthy Steamship Company and Automotive Trades Steamship Company a certificate of convenience and necessity to operate as common carriers in the transportation by water of motor vehicles from Detroit, Michigan, to ports

on Lake Erie and Lake Superior.[1] The companies receiving this certificate are both controlled by T. J. McCarthy (R. 12, 123) and will be referred to as the McCarthy Companies. They intervened in the district court in support of the Commission's order and have joined in the appeal to this Court (R. 78–79, 91–93).

Appellees Detroit and Cleveland Navigation Company (referred to herein as D. & C.), Nicholson Universal Steamship Company (referred to herein as Nicholson) and Great Lakes Transit Company have operated in the past on the Great Lakes as common carriers of motor vehicles and have expressed the intention of resuming this service when automobile production recommences (R. 15–16). They opposed before the Commission the granting of any certificate of public convenience and necessity to the McCarthy Companies (R. 11) and brought the present suit to set aside the certificate issued by the Commission (R. 1–9).

The McCarthy Companies instituted the proceeding before the Commission by filing applications which, as amended in October 1941, sought certificates of public convenience and necessity

[1] The Commission's certificate runs to T. J. McCarthy Steamship Company, for itself and as managing agent of Automotive Trades Steamship Company (R. 20–22). The two companies had agreed that, if their applications were granted, a single certificate in this form might be issued (R. 12).

under the "grandfather" clause of Section 309 (a) or under Section 309 (c) of the Interstate Commerce Act (49 U. S. C. 909 (a), 909 (c), Appendix, *infra*, pp. 53, 54), to operate as common carriers by water in transporting motor vehicles between Detroit and other Lake Erie ports (R. 10–11). The applications were consolidated and, after the taking of evidence (R. 98–294, 532–593), Division 4 of the Commission filed a report (Commissioner Porter dissenting) finding that the facts did not warrant issuance of a certificate of convenience and necessity under either Section 309 (a) or Section 309 (c) of the Act (R. 21–25). After entry of an order denying the applications for a certificate, the Commission, upon the petition of the McCarthy Companies, postponed the effective date of this order and reopened the proceedings for further hearings (R. 11, 26). Following the taking of additional evidence in June 1943 (R. 399–495), the full Commission filed its report in March 1944 (R. 10).

The Commission, on the applicants' motion (R. 418), treated the applications as requesting authority to transport motor vehicles between Detroit and Lake Superior ports as well as between Detroit and Lake Erie ports (R. 10–11). The Commission affirmed the action of Division 4 in denying a certificate under the "grandfather" clause of Section 309 (a) of the Act, but it found upon review of the evidence that the transportation service proposed by the McCarthy Companies

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will be required by future public convenience and necessity and that the companies had therefore met the requirements for the issuance of a certificate of convenience and necessity under Section 309 (c) of the Act (R. 11–19).[2] Such certificate was then issued (R. 20–21) and petitions for reconsideration filed by the present appellees were denied (R. 57–8, 74–75, 77).

Among the subordinate findings of the Commission from which it concluded that public convenience and necessity require the granting of the requested operating authority, are the following:

The McCarthy Companies owned three vessels equipped as automobile carriers[3] which, prior to the cessation of the manufacture of motor vehicles for civilian use, were extensively used in transporting automobiles from Detroit to Lake Erie ports (R. 12, 14). These vessels have in the past been essential to such transportation; without them it would not have been possible for the water carriers to have handled the automobiles offered for transportation in 1940 and 1941; and there will be a like definite need for the service of these vessels when normal automobile production is resumed (R. 14, 17). The McCarthy Companies

[2] Four Commissioners dissented from the finding that future public convenience and necessity will require the service proposed by the McCarthy Companies (R. 19–20).

[3] Vessels with special equipment and structually designed for carrying automobiles (see R. 127) will be referred to as automobile carriers.

have retained all the equipment and parts necessary for reconverting their vessels into automobile carriers and the companies intend so to reconvert their vessels upon termination of the national emergency (R. 12, 17). Refusal of the requested grant of operating authority might seriously impair the investment of the McCarthy Companies in their vessels and would deprive shippers of necessary transportation facilities (R. 17).

At certain times prior to 1942 there were insufficient vessels, including those of the McCarthy Companies, fully to meet the needs of shippers of automobiles, and similar situations may likely arise in the future upon resumption of normal production of automobiles (R. 17). In 1940 and 1941 there were delays ranging from two to four days in the loading of automobiles from the docks at Detroit incident to the congestion of such traffic and the inability of water carriers to handle it promptly, which caused delays in delivery at final destination and resulted in numerous complaints, and because of such delays it was necessary at times to move by motor truck automobiles which had been previously delivered to the docks at Detroit for water transportation (R. 14). No automobile carriers were in operation on the Great Lakes at the time of the hearing and a large percentage of all types of vessels formerly used in the transportation of motor vehicles have been requisitioned by the Government (R. 13). Re-

placement by D. & C. of its combination passenger and freight vessels alone will not adequately meet the needs for service when conditions become normal, and this will also be true of the combination passenger and freight vessels operated by Great Lakes Transit Company (R. 17). Although considerable tonnage is expected to be available at the termination of the war, there is uncertainty as to the length of time that may be required to procure and place in operation on the Great Lakes additional vessels adapted to the needs of automobile transportation (*ibid.*).

The public interest will be adversely affected if, after the production of automobiles is resumed, appellees are delayed in acquiring the additional facilities which, as they indicate, will be necessary to meet the increased demands for transportation (R. 18). Grant of temporary operating authority to the McCarthy Companies will not meet the requirements of future public convenience and necessity (*ibid.*).

It thus appears that the Commission, in considering the future needs of automobile transportation by vessels upon the Great Lakes, primarily had in mind and found that the resumption of automobile manufacture would require prompt and large-scale water transportation. The Commission, having found that the facilities owned by the McCarthy Companies had been utilized in the pre-war transportation and that,

notwithstanding such use, the total water-carrying facilities had been at times inadequate to meet traffic demands, proceeded to incorporate these factors in its ultimate judgment of future need. Likewise, the Commission found that the public interest required prompt availability of facilities following termination of the war. It measured the respective abilities of the appellees and the McCarthy Companies to reconvert their vessels into automobile carriers and found that the McCarthy Companies would be able to reconvert their vessels promptly but that there was grave doubt as to the ability of appellees to do so.

Appellees attacked the Commission's order in the court below upon the theory that the Commission's evidentiary findings were legally insufficient to suport its ultimate finding as to public convenience and necessity, and this was the basis upon which the district court rendered its decision (R. 83–84). It set aside the Commission's order upon the ground that, in the absence of a finding that appellees will be unable after the war to procure automobile-carrying tonnage adequate to meet then existing transportation demands, the Commission's evidentiary findings are insufficient to support its ultimate finding that future public convenience and necessity will require the transportation service proposed by the McCarthy Companies (R. 87). The court also rejected as "conjectural" the Commission's con-

clusion that the public interest will be adversely affected if, upon resumption of automobile production, appellees are delayed in acquiring the needed additional automobile-carrying tonnage (R. 88). And the court declared that "to introduce new and competing carriers into a field adequately served * * * * collides with the clearly defined purpose of the Transportation Act [of 1920] already indicated" (R. 88). The "clearly defined purpose" refers to an excerpt from *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, quoted earlier in the opinion[5] (R. 82–83).

A review of the evidence serves to show the solid foundations upon which the Commission's

[4] The court apparently made its own determination that delays in transportation during peak periods of automobile production, as found by the Commission (R. 14), did not render appellees' prior service inadequate. The court pointedly raised the question whether it is economical or in the public interest to expect or require water carriers to maintain the carrying capacity needed for the period of peak load (R. 88).

[5] The quoted excerpt is as follows (270 U. S. at p. 277):

> It [the railroad policy introduced by the Transportation Act of 1920] recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit * * *.

subsidiary findings and its ultimate finding of public convenience and necessity rest.

Three types of vessels have been used for transporting automobiles on the Great Lakes: automobile carriers, combination passenger and package freight vessels, and bulkers, *i. e.*, boats designed to carry bulk commodities. Bulkers are used for carrying automobiles to Lake Superior ports (R. 535, 549) but only from 10% to 12% of the automobiles shipped by water from Detroit have gone to these ports (Ex. No. 2, R. 594). Combination passenger and package freight vessels also carry a relatively small proportion of the automobiles shipped by water from the manufacturing plants in and near Detroit. D. & C., which operates vessels of this type (R. 105), appears to have carried on them only about 10% of its total shipments of automobiles other than tourist cars;[6] indeed, because of the tourist cars which these vessels transport, their "capacity for new automobiles is in a great many cases absolutely nil" (R. 106). Automobile carriers handle the balance of the waterborne shipments and are thus the

[6] Of the total number of automobiles (other than tourist cars) carried by D. & C. in 1940 and 1941, over 70% were shipped on the three automobile carriers which it chartered from the McCarthy Companies (Ex. 25, R. 321). Assuming that D. & C.'s fourth automobile carrier transported an additional 20%, this would mean that only about 10% of the automobiles (other than tourist cars) which D. & C. carried moved by its combination passenger and package freight vessels.

principal means used for transporting automobiles on the Great Lakes.[7]

The record shows that the three appellee companies engaged in automobile transportation on the Great Lakes on and prior to January 1, 1940. Of the three companies thus entitled, under the "grandfather" clause of Section 309 (a), to continue such operations, appellees D. & C. and Nicholson are the chief factors in the business.[8]

The story of D. & C.'s automobile-transportation business is primarily that of T. J. McCarthy and the McCarthy Companies. From 1933 to 1941, inclusive, McCarthy was, under successive agreements with D. & C., its exclusive agent for soliciting automobile traffic, and all dealings by shippers of automobiles, as to operation, rates and

[7] In *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, which was a general investigation by the Commission of the rates and practices of railroads and motor carriers applicable to interstate transportation of new automobiles, the Commission said (p. 482):

> Most of the automobiles shipped over the Great Lakes move in ships designed and built for this particular traffic. They are driven off the docks directly onto the ships and driven off the ships at destination, the loading and unloading operations being simple and fast.

[8] In 1940, Nicholson's shipments of automobiles from Detroit alone were 135,813 (Ex. 3, R. 594), D. & C.'s total shipments (other than tourist cars) were 104,864 (Ex. 25, R. 321), and total shipments by Great Lakes Transit Company were about 23,000 (R. 444).

everything else, were with McCarthy rather than D. & C. (R. 128, 231–232, 242, 291). The agreements provided that he should devote his full time to the business, should receive as sole compensation a commission on the automobiles transported, and should pay all the expense of employing others to assist him in soliciting traffic (Exs. 13, 15, 18, 19; R. 298–300, 302–304, 306–309).[9] The last of these agreements was to remain in effect until the close of the 1942 navigation season but was cancelled by mutual consent in February 1942 (Ex. 22, R. 313–315).

Prior to 1942 D. & C. was operating six combination passenger and freight vessels and four automobile carriers (R. 490, 540). The carriers had been put into operation by D. & C. as they were required to meet the needs for automobile transportation developed by McCarthy (R. 106, 178). D. & C. had purchased one carrier in 1934 but it later refused to invest further in carriers or to aid the McCarthy Companies in doing so, and the additional carriers required for the business were supplied solely through McCarthy's efforts (R. 178–180, 223, 279–280, 288, 292; Ex. 23, R. 316–320). To meet these transportation needs, three vessels purchased by the McCarthy Companies were converted by them into automobile carriers

[9] McCarthy maintained offices for soliciting automobile traffic in Detroit, Cleveland, Buffalo, New York and Philadelphia (R. 176).

at a cost of about $40,000 each and were chartered to D. & C., one from the beginning of the 1936 season, one from the beginning of the 1937 season, and one for the seasons of 1940 and 1941 (R. 107, 176, 189–190; Exs. 17, 20, 21, 22, R. 305–306, 309–310, 312–313, 314–315).

D. & C. no longer controls any automobile carrier. Since February 1942 it has had no charter for the McCarthy Companies' vessels, no option to charter them, and no agreement of any kind with the McCarthy Companies (R. 188; Exs. 21, 22, R. 311–315) and the one automobile carrier owned by D. & C. has been requisitioned by the Government and removed to salt water (R. 292, 540; Ex. 33, R. 495).[10] D. & C.'s general manager testified that the president of the company had advised him that D. & C. intended to equip itself after the war with automobile-carrying facilities equivalent to its former facilities (R. 489–490, 491–492).

Prior to 1942 Nicholson operated a fleet of twelve boats of which four were automobile carriers and eight were bulkers used or capable of being used for carrying automobiles westbound and bulk commodities eastbound (R. 534–535). Five of the bulkers were chartered by Nicholson and it did not renew the charters for 1942 (R.

[10] The Government has also taken over one of D. & C.'s passenger steamers and converted it into an aircraft carrier (R. 477).

557). In June 1943 it was operating nine boats, of which five, including all four of its automobile carriers, had been purchased by the Government and were then engaged in the bulk trade carrying bulk commodities (R. 407, 482–483).[11] It had a verbal understanding with an official of the War Shipping Administration, but no definite agreement, to be allowed to buy back these boats from the Government when the shipping emergency is over (R. 483, 486). The company believes that it will be able to take care of automobile traffic offered to it in the post-war period as the situation may unfold from month to month or year to year (R. 485).

Great Lakes Transit Company has operated on the Great Lakes since 1916 in the package freight business, and in 1942 it had fourteen boats, including one automobile carrier (R. 438–440, 442). The record does not show how many automobiles it carried from Detroit, but its total shipment of automobiles between any ports of the Great Lakes was about 23,000 in 1940 compared with total water shipments in 1940 from Detroit alone of approximately 263,000 automobiles (R. 444, 594). In 1942 the Government requisitioned all of its

[11] Nicholson's automobile carriers were the Woodroof (later named Fred L. Hewitt, R. 258), Sonoma, Coralia, and Crescent City (R. 534). Its only other boat with substantial automobile-carrying capacity was the Penobscot (R. 535). These five boats have all been purchased by the Government (Ex. 33, R. 495–496).

vessels and removed them to salt water so that the company was not operating at all in 1943 (R. 437, 463; Ex. 33, R. 495). Although it stated that it intended to resume its former business when this should become possible, carrying out of such a program would probably take a year's time, and in 1943 no plans had been drawn up and no options to charter were held (R. 439–440, 451).

The Great Lakes Transit Company and a competitor whose stock it had acquired prior to 1942 had each operated at a loss continuously from 1934 (R. 439, 441).[12] While the Government, after the close of taking of evidence, returned to the company four of its fourteen requisitioned vessels (R. 13), we are advised that the company has recently sold the four returned vessels for transfer to foreign registry and that it presently has no vessels of any kind.

In contrast to the appellees' lack of any substantial automobile-carrying capacity, the McCarthy Companies are in a position to put their vessels into prompt operation as automobile carriers. Prior to the 1942 navigation season they adapted their vessels for carrying grain, and prior

[12] The company's loss for the 1934–1941 period was well over $2,000,000 (R. 455; Ex. 36, R. 500). In 1942, a period of war-time prosperity and heavy demand for goods and services, the company's operating loss was about $200,000 (R. 462). The Government requisitioned its vessels at different times in 1942 so that the vessels available for operations in that year were cut about 50% (R. 437).

to the 1943 season they made further changes in two vessels to prepare them for carrying iron ore (R. 188, 401). The vessels were used in the bulk trade in 1942 and 1943, chiefly for carrying grain, but they also have had deck space for some automobiles and in 1942 they carried for the Army about 950 automobiles from Detroit to Buffalo (R. 402).[13] The McCarthy Companies own their vessels free and clear of mortgage and they have preserved, in order to permit reconversion of the vessels into automobile carriers, all of the equipment which they had originally put into the vessels when turning them into automobile carriers (R. 403). The vessels are, moreover, obsolete for operation in the bulk trade under peacetime conditions and could not profitably be so employed (R. 405).

Representatives of four automobile manufacturers (Chrysler, Ford, General Motors and Hud-

[13] Such operation was pursuant to temporary authority to operate as common carriers by water on the Great Lakes (R. 13), granted to the McCarthy Companies by the Interstate Commerce Commission under Section 311 (a) of the Interstate Commerce Act (49 U. S. C. 911 (a)). Under this Section, as amended by Section 103 of the Second War Powers Act, 50 U. S. C. App., Supp. IV, sec. 631 (b), subject to the termination provisions of Section 1501 of that Act (as amended by the Act of December 20, 1944, 58 Stat. 827, 50 U. S. C. App., Supp. IV, sec. 645), the temporary certificates held by the McCarthy Companies cannot extend beyond December 31, 1945.

son) and of four driveaway companies [14] testified in support of the applications of the McCarthy Companies for a certificate of public convenience and necessity. It appears from this testimony that during peak periods of production in 1940 and 1941 there were delays in transporting automobiles from Detroit to Buffalo and Cleveland which led to congestion on the docks at Detroit, complaints as to the service, and to some diversion of automobiles from water carriers to motortruck carriers (R. 227, 233, 235, 238, 240, 243–244, 246–247, 254, 256, 268–271, 276, 434).[15] The testimony also shows that if the three McCarthy Companies' vessels had not been used in 1941 for carrying automobiles, the facilities of the companies engaged in shipping automobiles by water from Detroit to Buffalo and Cleveland would have been inadequate for the transportation needs of shippers (R. 221, 228, 234, 237, 246, 259, 271, 277, 434–435).

[14] These driveaway companies are common carriers engaged in transporting automobiles by truck and driveaway convoys and have joint rates with the water lines covering automobiles shipped by water to Buffalo and Cleveland (R. 246, 248, 253, 267–268, 275–276).

[15] Chrysler's representative pointed out that if the automobiles offered for water shipment do not move promptly his company has to find other modes of transportation because it does not have space at its plants to store more than two days' production (R. 227).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that the Commission's subsidiary findings do not support its ultimate finding as to public convenience and necessity.

2. In holding that the Commission's determination as to the public convenience and necessity of the transportation service proposed by the McCarthy Companies is invalid in the absence of a positive finding that the appellees will be unable to obtain the additional facilities which they will need in order to meet future transportation demands.

3. In concluding that it is the policy of the statute to forbid operation by a new water carrier if the past service of the existing carriers has been adequate.

4. In substituting its judgment for that of the Commission as to the adequacy of the past service of appellees.

5. In annulling and setting aside the Comission's order of March 7, 1944.

6. In failing to dismiss the complaint.

SUMMARY OF ARGUMENT

I

A. The district court read into Section 309 (c) of Part III of the Interstate Commerce Act, as a limitation on the Interstate Commerce Commis-

sion's power thereunder, a rule that service by a new carrier cannot be found to be required by future public convenience and necessity in the absence of a positive finding by the Commission that the existing carriers will be unable to acquire the additional facilities necessary for meeting future transportation needs. The court thereby substituted its judgment for that of the Commission as to the elements essential to a finding of public convenience and necessity. We submit that the holding is inconsistent with the decisions of this Court interpreting the statute as vesting in the Commission a wide range of administrative discretion in determining public convenience and necessity.

B. The district court supported its construction of Section 309 (c) by concluding that it is the policy of the statute not to permit new competition if the past service of the existing carriers has been adequate. This conclusion is contrary to the construction of the Act by the courts and is not supported by any of its provisions. The adequacy of the past service of the existing carriers is merely one consideration, to be weighed with others, in determining whether future public convenience and necessity will require operation by a new carrier.

II

The Commission found that there was serious doubt whether the appellees, the "grandfather-

date" carriers, will procure the facilities necessary for meeting, promptly and adequately, the transportation demands arising when normal automobile production is resumed, but that the McCarthy Companies unquestionably will (if granted operating authority) put into service vessels which before the war transported over 25% of the automobiles shipped by water from Detroit to other Great Lakes ports. The findings further show that the McCarthy Companies' applications are supported by those most concerned with the adequacy of the transportation service, and that the McCarthy officers are familiar with every phase of the business. We submit that there thus clearly was "a rational basis" for the Commission's conclusion that service by the McCarthy Companies, which will assure rather than leave conjectural the adequacy of the facilities for moving well over a quarter of a million of automobiles annually, will be required by future public convenience and necessity. This being so, the courts may not reject the Commission's administrative determination.

III

The Commission's findings as to the inadequacy of the appellees' prior service are in themselves sufficient, under the circumstances of this case, to support its finding of the public convenience and necessity of new carrier operations, and render

immaterial lack of a positive finding of appellees' inability to acquire the additional facilities necessary for providing adequate future service.

IV

The Commission's action in permitting the McCarthy Companies to broaden, during the course of the hearing, the scope of their application for operating rights was not prejudicial to appellees and was a permissible exercise of the Commission's power to regulate and determine its own procedural requirements.

I

THE COMMISSION'S DETERMINATION AS TO THE PUBLIC CONVENIENCE OF THE McCARTHY COMPANIES' PROPOSED SERVICE IS NOT INVALIDATED BY THE ABSENCE OF A POSITIVE FINDING THAT APPELLEES WILL BE UNABLE TO OBTAIN ADDITIONAL FACILITIES NEEDED TO MEET FUTURE TRANSPORTATION DEMANDS

A. THE STATUTE VESTS IN THE COMMISSION A WIDE RANGE OF ADMINISTRATIVE DISCRETION IN DETERMINING PUBLIC CONVENIENCE AND NECESSITY

The district court held that under Section 309 (c) of Part III of the Interstate Commerce Act (Appendix, *infra*, p. 54), unless the Interstate Commerce Commission specifically found that the appellee carriers will be unable to obtain the additional facilities which they will need if they are to meet the demands of shippers when normal automobile production recommences, the Commission could not rationally conclude that transportation service by the appellant McCarthy Companies

will be required by future public convenience and necessity.

Without conceding that the report of the Commission lacks findings with respect to the ability of appellees to procure facilities adequate to handle the anticipated post-war traffic, the effect of the lower court's decision is to assay the weight to be given such factor. Thus, under the court's decision, doubt as to the ability of the existing carriers to obtain necessary additional transportation facilities in time to meet the foreseeable future demand, and doubt as to the actual carrying out of their expressed intention to do so, are insufficient to support a finding as to the public convenience and necessity of service by a new carrier which has at its command substantial transportation facilities of the kind needed to meet future shipping needs.

We submit that the district court thus read into Section 309 (c) of the Act a limitation upon the Commission's power thereunder which no language of the Section supports and which improperly restricts the latitude which the courts have given the Commission in convenience and necessity cases. The limitation which the district court read into the Section 309 (c) is that service by a new carrier can never be found to be of public convenience and necessity unless actual inability on the part of existing carriers (not grave doubt as to their ability, as found by the Commission) to acquire the facilities requisite to future trans-

portation needs is affirmatively established and embodied in a finding of the Commission.

The provisions of Section 309 of the Interstate Commerce Act (Appendix, *infra*, pp. 53–55) prohibiting anyone from operating as a common carrier by water (unless he is merely continuing his operations on the "grandfather" date) without first obtaining from the Interstate Commerce Commission a certificate that the proposed service is required by public convenience and necessity parallel those of Sections 206 and 207 of Part II of the Act (49 U. S. C. 306, 307) applicable to common-carrier operations by motor vehicle other than those continued from the "grandfather" date. These limitations on new operations have their counterpart in the prohibition in Section 1 (18) of Part I of the Act against extending a line of railroad or constructing a new line unless the Commission has certified to the public convenience and necessity thereof. Neither in the foregoing Sections nor elsewhere in the Act is there any specification of the considerations upon which the Commission is to base its determination of the requirements of public convenience and necessity. Congress has laid down no more definite rule than that the Commission administer these Sections, like analogous provisions of the Act, in such a way as will, in the Commission's judgment promote the objectives implicit in other requirements of the statute or those ex-

pressed in the Congressional declaration of National Transportation Policy (Appendix, *infra*, pp. 52–53). See *Texas & Pacific Ry. Co.* v. *G. C. & S. F. Ry. Co.*, 270 U. S. 266, 277; *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 24–25; *Interstate Commerce Commission* v. *Parker*, No. 507, October Term, 1944, slip op. 4–5.

The decisions of this Court dealing with issuance of certificates of convenience and necessity by the Commission have emphasized the wide range of discretionary authority vested in it. In *Interstate Commerce Commission* v. *Parker*, No. 507, October Term, 1944, the Court said (slip op. 4):

> The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell* v. *United States*, 300 U. S. 276, 287. This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances.

And in *Barrett Line, Inc.* v. *United States*, No. 630, October Term, 1944, the Court held (slip op. 17) that it was not at liberty to interfere with the action of the Commission in refusing to issue a certificate for new operation as a contract carrier by water in view of "the range and weight of

the Commission's discretion in relation to such applications".

Under Part I of the Act it has been held that the function of the Commission in passing upon the public convenience and necessity of an extension of a railroad's line is "comparable to that involved in a determination of the propriety or application of a rate, rule or practice". *Texas & Pacific Ry. Co.* v. *G. C. & S. F. Ry. Co.*, 270 U. S. 266, 273. With reference to the meaning of the statute applicable to issuance of certificates authorizing such construction, this Court has said (*Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42):

> There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question.

The district court in the present case read into Section 309 (*e*), as a flat rule of law, that the Commission is without power to find that operation by a new carrier will be required by future public convenience and necessity unless the Commission positively finds that the "grandfather-date" carriers will be unable to procure the facilities which are essential if these carriers are to provide service

commensurate with future transportation needs. The facts here illustrate to what an extent the rule applied by the district court would prevent the Commission from authorizing new carrier service which is or will be required by public convenience and necessity. The appellees, the "grandfather-date" carriers, are without the facilities which they have used in the past in providing transportation service and which they must again have if they are to render adequate service in the future; the ability and willingness of these carriers to obtain such facilities are in many respects highly problematical; and the applicant carriers are experienced in the business and possess facilities which in the past carried more than 25% of the traffic (see *infra*, pp. 37–40). Nevertheless, under the district court's construction of Section 309 (c), the mere fact that it is not affirmatively shown or found that the "grandfather-date" carriers will be unable to acquire the necessary new facilities bars the Commission from finding that the service for which operating authority is sought is or will be required by public convenience and necessity. We submit that this construction deprives the Commission of freedom to exercise administrative judgment in the weighing of all considerations relevant to determination of public convenience and necessity and conflicts with the whole tenor of decisions respecting the Commission's functions and duties in making such determination.

B. IT IS NOT THE POLICY OF THE INTERSTATE COMMERCE ACT TO FORBID NEW CARRIER OPERATIONS IN EVERY CASE IN WHICH THE PAST SERVICE OF THE EXISTING CARRIERS HAS BEEN ADEQUATE

The district court supported its construction of Section 309 (c) by concluding that it is the policy of the Interstate Commerce Act to forbid new competition in any field which has been adequately served by the existing carriers (R. 88). While we later contend (*infra*, pp. 46–48) that the court erroneously substituted its own judgment as to the adequacy of the past service for that of the Commission, we now contend that even if the adequacy of appellees' past service be assumed *arguendo*, the policy against new competition which the district court deduced from the Act is erroneous and contrary to the interpretation given the Act by this Court.

In *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, this Court, in upholding a certificate authorizing construction of a new railroad line, said (p. 42):

> In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest.

The Court in that case said further (pp. 42–43) that a section of the Act relating to consolida-

tion of railway properties "clearly discloses a policy on the part of Congress to preserve competition among carriers" and that "the Commission has recognized the advantages of competitive service to shippers * * *, that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest."

We submit that the foregoing views have equal application to the provisions of the Act, added by the Motor Carrier Act and the Transportation Act of 1940, forbidding new motor-carrier and water-carrier operations without a certificate from the Commission as to the public convenience and necessity thereof. There is no reason to suppose that Congress intended to give to "grandfather-date" motor and water carriers any greater protection against new competition than it gave to the railroads when Congress, by the Transportation Act, 1920, prohibited extension of any railroad line and construction of any new line without a certificate of public convenience and necessity.

The National Transportation Policy (Appendix, *infra*, pp. 52–53) set forth in the Transportation Act of 1940 indicates no change in policy respecting new competition. It is there declared to be the policy of Congress to foster "sound economic conditions" among the several carriers and to encour-

age reasonable charges for transportation, without "destructive competitive practices." Certainly it cannot be said that in every case in which the service of the existing carriers has been adequate in the past, authorization of new competition will result in unsound economic conditions among the existing carriers or in destructive competitive practices.

It should be noted that a grant of operating authority to the McCarthy Companies will not impair or tend to impair appellees' capital investment in transportation facilities. There will be no impairment of appellees' present capital investment because, if the Commission's order authorizing the McCarthy Companies to operate is sustained, appellees must add to their present facilities if the future shipping needs of the public are to be met (*supra*, pp. 7–8, 13–16, 18). And, in acquiring additional facilities, they will of course do so in the light of the carrying capacity of the vessels operated or to be operated by the McCarthy Companies.

It should also be noted that there is not, in the case of acquisition of automobile carriers, any such permanent commitment of capital as there is when a railroad line is extended or a new line is constructed. To the extent that any appellee obtains automobile carriers under an agreement such as that made between D. & C. and the McCarthy Companies prior to the war, such appellee can, without cost to it, discontinue further use of the

carrier by simply failing to exercise its option to charter the vessel for the next navigation season.[18]

There is not in the present case any grant of new operating authority to a motor carrier which is a subsidiary of a railroad, where the grant might conflict with the declared policy that the Act be administered so as to "recognize and preserve the inherent advantages" of each mode of transportation. Even in that situation this Court has held that the Commission does not exceed the limits of its discretionary authority if it finds—notwithstanding absence of proof "as to the inadequacy of the presently certificated motor carriers" to provide a motor service coordinated with railroad service—that public convenience and necessity require that the railroad's subsidiary rather than the existing motor carriers perform the proposed new kind of motor service. *Interstate Commerce Commission* v. *Parker*, No. 507, October Term, 1944; see also *American Trucking Associations, Inc.* v. *United States*, No. 558, October Term, 1944.

The view of the court below as to the policy of the Act with reference to new competition differs from that expressed by other district courts. In cases involving certificates by the

[18] The Commission did not, as in *American Trucking Associations, Inc.* v. *United States*, No. 558, October Term, 1944, reject any evidence offered to show the economic effect upon the existing carriers of the proposed grant of new operating rights.

Commission that extension or construction of a railroad line is of public convenience and necessity the courts have said that the Interstate Commerce Act, unlike the law of trade-marks, does not give an exclusive right to the first in the field, and that any monopoly of transportation enjoyed by existing carriers is, under the Act, simply a privilege which is subject to exercise by the Commission of its power to find that entrance of an additional carrier into the field is required by public convenience and necessity. *Pennsylvania R. R. Co.* v. *United States*, 40 F. 2d 921, 925 (W. D. Pa.); *Indian Valley R. R.* v. *United States*, 52 F. 2d 485, 487 (N. D. Calif.); cf. *Davidson Transfer & Storage Co.* v. *United States*, 42 F. Supp. 215, 219 (E. D. Pa.), affirmed, 317 U. S. 587. This doctrine has likewise been applied to the motor-carrier field. *Inland Motor Freight* v. *United States*, 36 F. Supp. 885, 888, 889 (D. Idaho).[17]

[17] In *Transcontinental & Western Air, Inc. et al., Additional North-South California Services*, 4 C. A. B. 373, the Civil Aeronautics Board, in granting a certificate of public convenience and necessity for new operating rights, said (p. 375):

> In considering the extent to which competition is necessary to assure the sound development of an air transportation system, therefore, its justification does not depend upon the inability or unwillingness of an existing carrier to render adequate service. The carrier's failure in this regard may evidence a need for competition, but its ability and willingness to furnish a sufficient volume of service does not, of itself,

To accept the view of the district court that it is the policy of the statute to bar new competition in any case in which the service of the existing carrier or carriers has been "adequate" means that, if there was but one carrier operating in the field on the "grandfather" date, this carrier enjoys a legal right to monopolize the field no matter how great the subsequent increase in traffic due to new industrial developments, population changes, and the like. The law as so construed would make inadequacy of service, in the sense of failure to meet the minimum obligations as to serv-

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constitute a bar to the authorization of a competitive service. Otherwise, no competition would ever be authorized for there is no limit to the extent to which an existing carrier could expand to meet increased demand. Adequate service is a relative expression which has been construed to mean only that such facilities must be supplied as might be fairly demanded, * * *. This service is but the minimum standard fixed by the Act, but considerations of national policy require much more.

In *Colonial Airlines, Inc. et al., Atlantic Seaboard Operation*, 4 C. A. B. 552, involving a like certificate, the Board said (p. 555):

> The improvements which flow from a competitive service cannot be obtained by administrative fiat. * * * As we stated in the *California North-South* case there is a strong, although not conclusive, presumption in favor of competition on any route which offers sufficient traffic to support competing services without unreasonable increase of total operating cost.

See also *Pan-American Bus Lines Operation*, 1 M. C. C. 190, 208–209; *Missouri Pac. Transp. Co. Extension-Natchez-New Orleans*, 9 M. C. C. 712, 717.

ice imposed by law, the sole ground for authorizing new competition. The Commission would then be barred from finding that public interest and convenience require new competition as an effective stimulus to improvements and refinements in service. See *Santa Fe Trail Stages, Inc., Common Carrier Application,* 21 M. C. C. 725, 748–749; *Virginia Stage Lines, Inc.* v. *United States,* 48 F. Supp. 79, 81 (W. D. Va.). We contend, in short, that whether entrance of an additional competitor into any particular field of transportation is of public convenience and necessity involves determination of a complicated transportation question and that the function of making this determination "is peculiarly one for the Commission, not the courts". *Alton R. R. Co.* v. *United States,* 315 U. S. 15, 23.

As the foregoing cases (*supra,* pp. 28, 31, 32) fairly indicate, adequacy of existing facilities and service is by no means a conclusive test in applying the statutory standard.[18] Indeed the creation of competition within a given field may be to the public advantage so as to support a finding of public convenience and necessity.

But in the instant case there was not present the bare question of the introduction of new competition in a field already adequately served. The

[18] In *Inland Motor Freight* v. *United States,* 36 F. Supp. 885, 886 (D. Idaho), the protestant carriers unsuccessfully urged that the Commission must find their services inadequate before authorizing operations by a new carrier.

issue before the Commission was one of future public need and convenience. It was confronted with a situation where operations by existing carriers had been suspended and their facilities converted to other uses. It had to determine on the basis of the record before it whether the future shipping needs could be met adequately and promptly when normal operations were resumed. In this setting the question presented, therefore, was whether the policy of the statute foreclosed the Commission's granting the application of the McCarthy Companies. That it did not, we submit, is clear.

The test of the validity of the Commission's order reverts to a consideration of the basis upon which it acted. As shown by its report, the Commission gave consideration to the ability of existing carriers to acquire additional facilities (*supra*, p. 8). But it found that there was much uncertainty as to the length of time that might be required to procure and place in operation on the Great Lakes additional vessels needed to handle the traffic at the termination of the war. So, too, the Commission expressed its doubt whether the replacement by appellees of their vessels would meet the need of postwar traffic. These considerations coupled with its other findings meet the test of "rational basis" (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125), and the lower court's insistence that the Commission's finding

as to ability to procure the necessary facilities must be positive and unequivocal is erroneous since it is tantamount to a substitution of its judgment for that of the Commission as to the weight to be given relevant factors.

II

THE COMMISSION'S FINDING THAT THE TRANSPORTATION SERVICE PROPOSED BY THE APPELLANT STEAMSHIP COMPANIES WILL BE REQUIRED BY FUTURE PUBLIC CONVENIENCE AND NECESSITY, RESTS UPON A RATIONAL BASIS, AS DISCLOSED BY ITS REPORT, AND IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The situation presented here, in which the "grandfather-date" carriers have lost most of the facilites necessary for providing the transportation service which they were rendering before the war brought the service to a stop, is unusual, but this fact does not alter the Commission's duty or functions under Section 309 (c). Where the situation is exceptional, just as where the facts fall within a familiar pattern, the Commission must determine whether under all the circumstances of the particular case a grant of new operating authority is required by present or future public convenience and necessity. We therefore set forth the facts before the Commission relevant to this issue, for the purpose of demonstrating that the limitation on the Commission's power enforced by the district court defeats a ruling as to public convenience and necessity which, by any conceivable test, is well

within the limits of reasonable administrative judgment.

Concerning the past and prospective operations by appellees, the "grandfather-date" carriers, the evidence showed:

Great Lakes Transit Co. All of its vessels have been requisitioned by the Government and removed to salt water, and at the close of the Commission's hearing the company was not operating at all (R. 437, 463; Ex. 33, R. 495). It would probably take a year to purchase and equip or to build vessels fitted to the needs of its business and no definite plans to this end have been made (R. 439–440, 451). For eight consecutive years before the war the company operated at a loss, during which time its losses amounted to well over $2,000,000, and in 1942 its operating loss was about $200,000 (R. 439, 441). These facts provide little assurance as to either the ability or the willingness of this carrier to furnish after the war, either promptly or at all, the same transportation service rendered by it before the war.

Nicholson. All of this company's four automobile carriers and its only other vessel with substantial automobile-carrying capacity have been purchased by the Government, but the company intends to transport automobiles after the war when there is need for this service (R. 407, 482–483, 485). While the evidence indicates that the

company will probably be able to purchase the requisitioned vessels which it had previously used as automobile carriers, no evidence was offered as to how quickly these vessels could be reconverted into automobile carriers.

D. & C. Of the four automobile carriers operated by this company before the war (R. 490, 540), the three chartered from the McCarthy Companies are no longer available to it and the company's fourth carrier has been requisitioned by the Government (R. 292, 540; Ex. 33, R. 495). The company has no personnel acquainted with automobile shippers and their needs (R. 128, 231–232, 242, 291), and it has shown in the past extreme reluctance to invest its capital in automobile carriers (R. 178–180, 223, 279–280, 288, 292; Ex. 23, R. 316–320). Despite testimony as to the company's general intention to acquire automobile-carrying facilities equal to those previously operated (R. 489–490, 491–492), under all the circumstances the Commission might well have doubted whether the company would proceed with dispatch and vigor in procuring the facilities necessary to serve adequately the future needs of automobile shippers. And the evidence fails to show that the company could definitely obtain the necessary automobile carriers or that, if it did obtain them, how long a time this would take.[19]

[19] On the question of D. & C.'s ability to obtain facilities, the district court referred to the testimony that if the McCarthy Companies had not supplied D. & C. with automo-

The transportation service which the McCarthy Companies are capable of rendering was also fully shown. These companies can promptly put into operation automobile carriers (R. 12, 17, 402, 403, 405) which in 1940 transported at least 27% of all the automobiles shipped by water from Detroit.[20] The president of these companies has had more than 20 years' experience in the business (R. 170–171), including nine years as the exclusive agent for D. & C. in soliciting automobile traffic (Exs. 13, 15, 18, 19, 22; R. 298–300, 302–304, 306–309, 313–315). The McCarthy Companies have been willing to invest their capital in automobile carriers and have every reason, as well as the intention, to do so after the war.

As the Commission's report shows, it is in many respects highly conjectural whether the

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bile carriers it could have obtained them from other sources, and the court made its own assumption that after the war vessels capable of conversion into automobile carriers would be equally available (R. 87).

On the question whether the company would provide adequate facilities the Commission might have taken into consideration the possible advantage to the company of some shortage in automobile carriers, which would lead to full utilization of the space for automobiles on the company's combination passenger and package freight steamers.

[20] Out of total shipments of 262,967 automobiles from Detroit in 1940 (R. 594), vessels of the McCarthy Companies carried 70,064, or 27%. The figure of 70,064 represents the 77,741 automobiles (other than tourist cars) which these vessels carried in 1940, less the 7,667 automobiles carried on them which were shipped from ports other than Detroit (Exs. 24, 25; R. 321).

appellees will make prompt and adequate provision for transporting the automobiles offered for shipment from Detroit to other Great Lakes ports once manufacture of automobiles to meet the demand dammed up by the war gets under way. The McCarthy Companies, on the other hand, can definitely put into almost immediate service vessels which before the war carried more than 25% of this traffic. It is likewise significant that those directly concerned with the adequacy of the post-war service—the leading automobile manufacturers located at Detroit and the trucking companies which move automobiles to inland points after water shipment from Detroit—strongly supported the application of the McCarthy Companies (see Statement, *supra*, pp. 17–18). The question is thus presented whether the statute withholds from the Commission the authority to determine, in the exercise of its administrative judgment, that the public convenience and necessity require that provision of facilities adequate to meet future transportation needs be assured rather than merely conjectural.

The statute certainly does not bar the Commission from basing its decision, in part, on forecasts as to the future. This is implicit in the statutory mandate to determine what "will be" required by "future" public convenience and necessity. Forecasts as to the future equally enter into the Commission's determination whether it concludes that a proposed new service

will not be, or that the service will be, required by the future public convenience and necessity. The Commission in its decision in the present case referred to a decision by Division 5 (*Arco Auto Carriers, Inc., Extension—Kenosha—Racine, Wis.* (not printed)), decided December 18, 1943, granting authority to operate as a motor carrier in the transportation of new automobiles notwithstanding the discontinuance of production of automobiles for civilian use and quoted (R. 18) the following from this decision:

> While the curtailment in the production of automobiles during the national emergency results in a temporary diminution in the demand for the transportation of such commodities, it has not been our policy to deny an application because of the changed conditions resulting from the war, if the evidence otherwise supports a grant thereof. Normal conditions including the demand heretofore experienced are bound to recur and applicant should not then be expected to incur the cost and delay of a further proceeding.

In *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, 555–556, the full Commission in February 1945 rendered a decision in a general investigation, begun in 1939, of the rates and practices applying to transportation of new automobiles by railroads and motor carriers. The Commission rendered decision although most of the parties had asked that the proceeding be dis-

continued or dismissed without a report or held in abeyance until after the emergency, for the reason that virtually all transportation of new automobiles had ceased shortly after our entry into the war and that, when large-scale production is resumed, conditions might be substantially different (*idem*, at p. 477). And in *Newtex S. S. Corp. Common Carrier Application*, 260 I. C. C. 418, an application by a water carrier for a certificate was granted even though existing war conditions did not permit the resumption of its coastwise operations. As here, the protestant carriers had urged that the applicant's claims dealt with the future and were fatally conjectural.

Over a quarter of a million automobiles were shipped by water from Detroit in 1940 (R. 594) when production was considerably less than in 1941 (R. 232) and even further below the anticipated production in the first year after the war (R. 229).[21] The question of availability of facili-

[21] Appellees have never questioned that the post-war demand for facilities for shipping automobiles by water on the Great Lakes will exceed the demand in 1940 and 1941 (see R. 229, 434).

Water shipment of new automobiles on the Great Lakes will offer the same economies and advantages after the war as before. In *New Automobiles in Interstate Commerce*, 259 I. C. C. 475, 554, the Commission said that water carriers "obtain practically all the traffic from Detroit to Cleveland and Buffalo, because they provide mass transportation, as well as good service at the lowest available rates." See also *idem*, p. 487.

ties adequate to meet post-war transportation needs is thus one of serious public concern. In these circumstances the Commission was under a plain duty not to leave the answer to this question in doubt or to mere happenstance if there was any other alternative. The McCarthy Companies' applications for operating authority provided as an alternative a guarantee of facilities which, added to those which appellees may or will provide, should assure the public satisfactory service after the war.

We submit that in this situation it was clearly reasonable for the Commission to conclude that the services of the McCarthy Companies will be required by the future public convenience and necessity. Since there is "a rational basis," disclosed by the report and supported by substantial evidence, for the conclusion reached by the Commission, "the judicial function is exhausted" and the Commission's order must stand although a court, exercising its own independent judgment upon the facts, might reach a conclusion different from that of the Commission. *Rochester Tele-Phone Corp.* v. *United States*, 307 U. S. 125, 146. We submit that the decision of the district court in the present case transgressed this rule in substance, if not in form, and, as we have previously pointed out (*supra*, pp. 28–36), the court's decision finds no support in the policy of the statute.

In the prior proceedings in this case appellees have relied upon a computation purporting to

show the automobile-carrying capacity of Nicholson vessels in excess of their actual carriage of automobiles in 1940 (R. 595).[22] We submit that the basis of the computation is so defective that it can be given very little weight. The computation assumes continuous automobile production throughout the navigation season whereas there customarily is a summer shutdown of production of from four to six weeks to permit retooling and other factory preparations for making new models (R. 200–201, 542, 596–598). It also assumes 252 days of operation by each of the six Nicholson vessels having the largest automobile-carrying capacity although only one of the company's 12 vessels operated for this length of time in 1940 (R. 562, 595). It uses the period of open navigation between Detroit and Cleveland, which is appreciably longer than that between Detroit and Buffalo, to calculate the potential days of operation between Detroit and Buffalo (R. 560–561, 595). It is also questionable whether the computation makes allowance for operating time lost on account of delays for cleaning boilers, repairs, etc. (R. 558–559, 566–567), and when this question was raised counsel for appellees offered to stipulate that the potential operating days

[22] The Commission took notice of this by referring to evidence which had been submitted to show that Nicholson's vessels had not been "operated to capacity in the past" for transportation of automobiles (R. 15).

shown by the computation be reduced 10% on this account (R. 567).

In the district court appellees contended that the Commission's subsidiary finding as to the need for use of the McCarthy Companies' vessels in transporting automobiles when there is again normal production does not support its finding that future public convenience and necessity will require service by the McCarthy Companies as common carriers of automobiles. The contention is that the transportation facilities available to the public will be the same whether the McCarthy Companies' vessels are in the future operated by them or are chartered to and used by D. & C. or one of the other appellees.

Our answer to this contention is twofold. First, future operation of the vessels by the McCarthy Companies is certain (provided necessary authority therefor is granted) while their charter and use by any appellee are uncertain.[23] There is thus presented in another form the question whether the Commission has power to determine that public convenience and necessity require that provision of transportation facilities essential to future shipping needs be assured rather than left conjectural. Second, it is a reasonable, and there-

[23] In view of the controversy between the parties in the present case, it is very doubtful whether either the McCarthy Companies or D. & C. will wish to enter into business relationships and chartering agreements similar to those made before the war.

fore a permissible, conclusion for the Commission to reach that public convenience and necessity will be better served if these needed vessels are operated by their owners who, in addition, largely developed the business, know its needs, and risked their capital in it, rather than by the former charterer of the vessels, of whom none of these things can be said.

III

THE COMMISSION'S FINDINGS AS TO THE INADEQUACY OF THE APPELLEES' PAST SERVICE ARE IN THEMSELVES SUFFICIENT TO SUPPORT ITS FINDING OF THE PUBLIC CONVENIENCE AND NECESSITY OF OPERATIONS BY THE McCARTHY COMPANIES

Concerning the extent to which appellees had failed to provide service fully meeting the needs of shippers, the Commission found (R. 14):

> In 1940 and 1941, there were delays ranging from 2 to 4 days in the loading of the automobiles from the docks at Detroit incident to the congestion of such traffic and the inability of the water carriers to handle it promptly, which caused delays in delivery at final destination and resulted in numerous complaints from automobile dealers and distributors. Because of such delays, it was necessary at times to move by motortruck automobiles which had been previously delivered to the docks at Detroit for water transportation.

The evidence fully supports these findings (see Statement, *supra*, pp. 17–18). It is also clear that

the Commission based its finding as to the public convenience and necessity of the service proposed by the McCarthy Companies in part upon these findings.[24] The Commission said (R. 17):

> At certain times during the period prior to 1942, there were insufficient vessels, including applicants' vessels, fully to meet the needs of shippers of motor vehicles and similar situations may likely arise at such times in the future after the war upon the resumption of normal production of motor vehicles.

The failure of the existing carriers to provide facilities to meet fully the needs of shippers is certainly a cogent reason for concluding that public convenience and necessity require operation by a new carrier.[25] The statute declares it to be the National Transportation Policy to promote "adequate" service and to develop a national transportation system "adequate to meet the needs of the commerce of the United States" (Ap-

[24] The legislative history of Section 14 (1) of Part I of the Act (49 U. S. C. 14 (1)), upon which Section 316 (c) (49 U. S. C. 916 (c)) is modelled, makes it plain that the Commission is not required to make formal and precise findings, H. Rep. No. 591, 59th Cong., 1st sess., p. 4; see also *Meeker & Company* v. *Lehigh Valley R. R.*, 236 U. S. 412, 428; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 487; *United States* v. *Louisiana*, 290 U. S. 70, 80; *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 465.

[25] See cases cited in note 1 of the dissenting opinion in *Interstate Commerce Commission* v. *Parker*, No. 507, October Term, 1944.

pendix, *infra*, pp. 52–53). Where, as here, the prior shortage in transportation facilities was not due to inability to obtain them, it is reasonable to conclude that public convenience and necessity require that the additional facilities which a new carrier will provide shall be available to shippers, irrespective of whether or not the existing carriers will be unable to obtain the additional facilities necessary for meeting future transportation demands.

While the court below may have concluded that appellees' transportation service was adequate notwithstanding the delays which occurred in moving the automobiles offered for shipment during peak periods of production, the Commission concluded otherwise. Since this conclusion is within the range of reasonable administrative judgment, it must be upheld. The Commission's determination of an issue of this kind will not be set aside by the courts "when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; see also *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42; *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87–88.

IV

THE INCLUSION OF LAKE SUPERIOR PORTS WITHIN THE OPERATING AUTHORITY GRANTED TO THE McCARTHY COMPANIES WAS NOT ERRONEOUS

The applications filed with the Commission by the McCarthy Companies sought operating rights between Detroit and other Lake Erie ports. On oral argument before Division 4 these companies indicated that they desired authority to serve other ports on the Great Lakes, such as Duluth on Lake Superior (R. 22). At the hearing held after the Commission had reopened the proceedings for further hearings following the decision by Division 4, counsel for the McCarthy Companies stated explicitly that they sought authority to operate between Detroit and Lake Superior ports (R. 410–411, 414). He also formally moved that the companies' applications, if not of this scope, be amended to have that scope, and the Commission's examiner ruled that he would receive testimony offered by the McCarthy Companies with reference to transportation of automobiles between Detroit and Lake Superior ports (R. 418). Appellees, in turn, offered substantial evidence as to such operations (R. 536–546, 548–551, 593–596, 599–601).

Since the appellees had opportunity to, and did, meet the issue raised by the McCarthy Companies' motion to broaden the scope of their applications, appellees were not prejudiced by the

Commission's action in treating the applications as having been broadened to include operations to Lake Superior ports (R. 11–12). We submit that the district court, in upholding the validity of this ruling, correctly stated the controlling considerations as follows (R. 89):

> In view of the wide latitude accorded the Commission in regulating its procedure and freeing it of the technical requirements of pleadings and proofs, and the failure adequately to show prejudice, we are not persuaded that the order of the Commission, if valid, is too broad.

Chicago, St. P., M. & O. Ry Co. v. *United States,* 322 U. S. 1, sustained an order of the Commission against attack upon the ground that it granted to the carrier operating rights greater than those for which application had been made. Both of the grounds on which this Court rested its decision apply to the present case. (1) Since appellees did not put in evidence their petitions for reconsideration (see R. 73–74),[26] they have failed to show that they claimed surprise as to the ruling respecting Lake Superior ports or that they sought to put in new evidence at the rehearing they were requesting. On like facts, this Court said in the *Chicago* case (p. 4): "The Court endeavors to protect the right of parties to fair hear-

[26] Their complaint did not allege that the Commission, by granting operating rights on Lake Superior ports, had denied appellees a fair hearing (R. 1–9).

ings, but it will not presume that their rights have been substantially denied when they do not embrace the opportunity to prove their grievance in the court below." (2) The Court in the *Chicago* case also said that certain provisions of Section 208 (a) of Part II of the Act make it clear that the Commission has power to authorize service greater than the motor carrier has asked. The same provisions are found in Section 309 (d), which applies to certificates of convenience and necessity for operation as a common carrier by water.

CONCLUSION

For the reasons stated, the decree of the district court should be reversed, with directions to dismiss the complaint filed in the district court by the present appellees.

Respectfully submitted.

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SEPTEMBER 1945.

APPENDIX

The Transportation Act of 1940, 54 Stat. 899, inserts before Part I of the Interstate Commerce Act the following declaration of National Transportation Policy:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to

carrying out the above declaration of policy.

Section 309 of Part III of the Interstate Commerce Act, as enacted by the Transportation Act of 1940, 54 Stat. 941, 49 U. S. C. 909, provides in part as follows:

> (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. * * *
>
> (b) Application for a certificate shall be made in writing to the Commission, be

verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

(c) Subject to section 310,[1] upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, in-

[1] Section 310 provides that no person shall hold both a certificate of convenience and necessity for operation as a common carrier by water and a permit of convenience and necessity for operation as a contract carrier by water unless the Commission finds, for good cause shown, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in the Act.

cluding terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission, pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

(e) No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways.

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